

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

Index No.

01-08-01789

BERNARD L. MADOFF, IRVING PICARD  
and THE BANKRUPTCY LINK, et al.

Debtors.

-----x  
December 17, 2009

United States Custom House  
One Bowling Green  
New York, New York 10004

In Re Fee Application for all Professionals, et al.

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy Judge

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

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A P P E A R A N C E S:

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BY: DAVID SHEEHAN, ESQ.

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-and-

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BY: KEVIN H. BELL, ESQ.

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BY: LOUIS A. COLOMBO, ESQ.

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DAVID E. KITCHEN, SQ.

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1 A P P E A R A N C E S: (Continued)  
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17 BY: JAMES C. McCARROLL, ESQ.  
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19 LANCE GOTTHOFFER, ESQ.  
20 -and-  
21 JOHN SCOTT, ESQ..  
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24 Capital Corporation  
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-and-  
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1 A P P E A R A N C E S: (Continued)

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18 BY: DANIEL ZINMAN, ESQ.

19

20

21 ALSO PRESENT:

22 Lee Richards

23 Stefanie Grossman

24

25

1 | Proceedings

2 THE COURT: Bernard Madoff, Irving Picard  
3 and the Bankruptcy Link.

4 MR. SHEEHAN: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. SHEEHAN: David Sheehan with the law  
7 firm of Baker Hostetler on behalf of the trustee for the  
8 liquidation Bernard Madoff, Securities Investor Protection  
9 Corp., LLC.

10 As you are fully aware, we have a number of  
11 matters on for a hearing this morning.

20 His pro hac vice admission is in process.  
21 It has not been fully processed, but I would like the  
22 Court's permission and counsel on the other side since Mr.  
23 Colombo has been handling matters since the outset that he  
24 be permitted to argue the motion here this morning?

THE COURT: There are some head nods at the

1 table.

2 There is no objection.

3 The application is granted. We will  
4 proceed to the many fee applications that we have.

5 MR. LEVANDER: Your Honor, Andrew Levander  
6 from the Dechert, LLP law firm. My partner today is Gary  
7 Mennitt. We represent Mr. J. Ezra Merkin and Gabriel  
8 Capital Corporation and Gabriel Capital Corporation. It is  
9 our motion to dismiss, and with the Court's leave I will  
10 proceed to argument.

11 THE COURT: Well, no, it seems to me that  
12 we have a preemptive motion and that is the motion to amend  
13 the complaint.

14 MR. LEVANDER: That is fine.

15 THE COURT: Which essentially is what your  
16 motion is targeting at. So let's hear the motion to amend  
17 first.

18 MR. LEVANDER: Fine. My partner, Gary  
19 Mennitt will handle it.

20 THE COURT: It is not his motion.

21 MR. LEVANDER: No, it is his opposition.

22 MR. COLOMBO: The motion for leave to file  
23 the second amended complaint as filed with the Court, and  
24 as the Court is well aware we are in the very early stage  
25 in those proceedings. There has been no discovery, we are

1 still in the pleading stage.

The test for allowing the amendment, of course, is whether there is undue delay, which there hasn't been; whether there is prejudice, there hasn't been. They don't even challenge those issues in their briefs in opposition to the motion for relief. They challenge the motion on the grounds that the amendment would be futile, but they never come to grips with what the thrust of the amendment is, the thrust of the amendment is to assert claims against Ezra Merkin, individually, as the general partner of these various funds, such as Ascot and Gabriel; Ascot in particular and as the general partner, the second amended claim asserts he is liable under New York law or Delaware law, whatever controls for the obligations of the fund, to the extent the fund can't satisfy those obligations of what we have alleged in the second amended claim.

18 We gather in our reply brief that fully  
19 establishes that Merkin is, in fact, obligated either under  
20 New York or Delaware law to satisfy the obligations of the  
21 partnership, to the extent the partnership cannot, I  
22 understand Ascot has essentially millions of dollars in  
23 fraudulent transfers, preferential transfers and in seeking  
24 to recover the second amended claim asks to proceed against  
25 Merkin. The law supports us, there has been undue delay

1 and we ask that it should be allowed.

2 THE COURT: Thank you.

3 MR. MENNITT: Gary Mennitt of the law firm  
4 Dechert, LLP, and Mr. Levander's partner.

5 Today we are before Your Honor with a  
6 motion to amend the complaint. We represent Ezra Merkin,  
7 Gabriel Capital Corporation and it is not an issue on that  
8 motion to amend.

9 Mr. Colombo's presentation just completely  
10 ignores the structure of the fraudulent conveyance  
11 provisions in the Bankruptcy Code, and the limited ability  
12 that a debtor-in-possession or trustee has to enforce those  
13 rules in Bankruptcy Court.

14 We did not dispute in our obligations to  
15 this motion the proposition that a general partner is  
16 generally liable for the obligations of a limited  
17 partnership, and that is the thrust of what Mr. Colombo  
18 just stood up and said, that is the thrust of what is in  
19 their motion papers but that is not even close to adequate  
20 because, and as a result their motion to amend is futile  
21 and the complaint as against Ezra Merkin for general  
22 partner liability would notwithstanding a motion to  
23 dismiss.

24 And the reason is because of the  
25 application of Section 550 of the Bankruptcy Code, Your

1 Honor. Section 550 of the Bankruptcy Code sets up an  
2 exclusive remedy, it sets up an exclusive remedy that a  
3 Debtor-in-Possession or trustee has to enforce either the  
4 Section 548 federal fraudulent conveyance provisions of the  
5 Bankruptcy Code, but also the Section 544, the fraudulent  
6 conveyance provision, that are incorporated in the  
7 Bankruptcy Code state law provision.

8 They are only incorporated in the  
9 Bankruptcy Court through Section 544, and as the Court is  
10 well aware those rights do not inure to the Debtor outside  
11 of bankruptcy.

12 The fact that Section 550 is the exclusive  
13 source of power for the Debtor in possession or the trustee  
14 to recover under any fraudulent conveyance action under the  
15 Bankruptcy Code is black letter law, and cases are cited on  
16 page 2 and on page 3 of our brief. Those are the  
17 Telligent case, Stratton Oakmont, Pereira and Hooker.

18 In the reply brief that the trustee filed  
19 in this case they don't cite any of those cases because  
20 they know it is black letter law. They cannot challenge  
21 the proposition that all fraudulent conveyance claims must  
22 channel through Section 550 in this Court.

23 There is no other power. There is no  
24 power under Delaware law to sue a general partner except  
25 through Section 550. They know that. They don't address

1 any of those cases.

10

The structure of the bankruptcy, Your Honor, the provisions, and I won't spend too long on this because I know the Court has written many times on these issues, is basically as follows: Under Section 544(b), the trustee can step in the shoes of the creditor and may avoid any transfer avoidable under the applicable law by a creditor.

14 THE COURT: It sounds to me, counsel, like  
15 you are arguing the notion to dismiss targeted for the  
16 second amended complaint.

17 And that the thrust of your argument is  
18 that if I grant the application it would be futile.

19 MR. MENNITT: That is correct. It would  
20 not survive the motion to dismiss. That is correct, it is a  
21 futile argument.

THE COURT: Do you have anymore witness?

23 MR. MENNITT: That is a ground for you to  
24 deny the motion to amend.

25 THE COURT: I understand that.

1                   MR. MENNITT: If I could just finish, and I  
2 won't take too much more of your time.

3                   THE COURT: Okay.

4                   MR. MENNITT: Section 544 says they could  
5 step into the shoes of the Debtor, and Section 548 sets up  
6 the fraudulent conveyance claims and Section 550 provides  
7 the exclusive remedy in Bankruptcy Court. They don't even  
8 attempt. In our papers we went through all of the people  
9 that the Bankruptcy Code says you could collect the 550  
10 claim against. They don't even attempt to say Ezra Merkin  
11 falls into any of those categories. He is not an initial  
12 transferee. He didn't have legal authority to take that  
13 money for himself. To the extent he is a subsequent  
14 transferee, they have that claim in the initial complaint  
15 but it is not a subsequent transferee because he is the  
16 general partner liable for all of these transfers and he is  
17 not a person for whose benefit the transfer is made as the  
18 general partner.

19                   We laid that all out in our brief. They  
20 don't address those issues in their response.

21                   And, Your Honor, the fundamental  
22 misapprehension of the trustee with respect to this motion  
23 is on Page 7 of their brief. They said in reality the  
24 proposed second amended complaint alleged that Merkin is  
25 liable for Ascot transfers under the new Debtor and

1 Creditor law as well as the Bankruptcy Code. See, their  
2 whole theory here, Your Honor, is that somehow because they  
3 are alleging state law claims under Delaware law for GP  
4 liability and under the state law --

5 THE COURT: They are arguing the motion to  
6 dismiss the second amended complaint.

7 MR. MENNITT: But that is exactly what a  
8 futility motion is.

9 THE COURT: I understand that. As I said,  
10 I have read all of the papers and I understand that the  
11 whole argument that you make is a futility argument.

12 MR. MENNITT: That is absolutely correct.

13 THE COURT: That is absolutely correct.

14 MR. COLOMBO: Maybe we are talking at cross  
15 purposes, but we are saying as a matter of law Mr. Merkin  
16 is liable for paying for those transfers that Ascot cannot  
17 pay. That is as simple as I could say it. And we don't  
18 think it is a futile argument. We think it is supported  
19 by laws in our briefs that we should be allowed to pursue  
20 the claim.

21 THE COURT: Thank you. As you well know,  
22 we are at the early stages here, and the trustee is dealing  
23 with a very complex set of facts, the facts are constantly  
24 emerging. All you have to do is follow the media and find  
25 out that more facts are unfolding every day. So it is not

1 beyond comprehension that you would get several requests  
2 for an amended complaint as more factors are discovered.

3                         The argument of futility I cannot buy into  
4 at this point.

5                         It is one that is supplanted by the fact  
6 that the second amended complaint as proposed does, subject  
7 to joinder pleadings present sufficient to withstand the  
8 motion, the objection to a motion to amend.

9                         It is clear that a party may amend its  
10 pleading on leave of the Court, as justice so requires and  
11 in light of the highly complex investigation and continuing  
12 discovery of new facts the Trustee apparently in good faith  
13 is asserting new liability claims against Mr. Merkin  
14 sufficient to open the door for the joinder of issues. That  
15 is where I am coming from, the joinder of issues, and then  
16 I will entertain the motions to dismiss if the Trustee has  
17 not plead sufficiently under those circumstances.

18                         Therefore, I am going to grant the  
19 Trustee's motion for leave to file the second amended  
20 complaint.

21                         Now, that carries with it a reaction to the  
22 other pending motion, and that is a motion to dismiss.  
23 Some parties, some parties including the Trustee seem to  
24 feel that this motion to amend only targets one or two of  
25 all of the defendants. I disagree.

1                   I think the rules and common sense indicate  
2 all of the motions to dismiss should provide the  
3 opportunity for all of the parties to effect a joinder.  
4 Some of the other defendants may very well feel that the  
5 second amended complaint is filed and served that they want  
6 to react to it and amend their pleadings likewise.

7                   So I am going to adjourn all of the motions  
8 to dismiss pending the service of the second amended  
9 complaint.

10                  How much time do you want for filing, and  
11 how much time do you want for a response?

12                  MR. COLOMBO: Today is Thursday. I guess  
13 by Monday.

14                  THE COURT: Are you sure you want Monday?  
15 There should be follow-up facts coming

16                  MR. LEVANDER: It takes 30 days to make a  
17 motion after that.

18                  THE COURT: Yes. Are you sure you want a  
19 month because there seems to be more factors and facts  
20 coming out in connection with that grand fraud almost every  
21 day? If you want a month, I will give you a month.

22                  MR. COLOMBO: I am not going for a month,  
23 Your Honor.

24                  THE COURT: I don't want to be faced with  
25 any continuous motions to amend based upon the latest new

1 fact that comes out.

2 MR. COLOMBO: I understand that and we are  
3 sensitive to that.

4 Let's say a week.

5 THE COURT: Very well.

6 MR. LEVANDER: And then 30 days from that.

7 Thank you very much.

8 MR. GOTTHOFFER: My name is Lance  
9 Gotthoffer. And with me today, Your Honor, is John Scott  
10 and James McCarroll from the law firm of ReedSmith  
11 representing Bart Schwartz, the New York State appointed  
12 receiver for the Ariel fund and the Gabriel fund.

13 Your Honor, I understand your point. I do  
14 want to say we would be happy to proceed today on argument,  
15 if Your Honor will permit that, but if Your Honor has made  
16 up his mind that you wouldn't permit that --

17 THE COURT: When you see where they are  
18 coming from, you may be closer to the road.

19 MR. GOTTHOFFER: I am ready to go now or 30  
20 days, as the Court may prefer.

21 THE COURT: Okay.

22 MR. SHEEHAN: Your Honor, we now have on  
23 the agenda a number of fee applications for this morning.  
24 Just to quickly review them. There are eight separate  
25 applications with regard to international counsel that have

1       been essentially retained by the trustee and are in various  
2       jurisdictions throughout the world.

3                   We had the application by Lee Richard,  
4       former receiver for BLMIS and his counsel as well as for  
5       Alix Partners, his consultant.

6                   We also have an application by Windels  
7       Marx, the special counsel retained by the Trustee.

8                   We also, of course, have an application by  
9       Mr. Picard as trustee and by Baker Hostetler as his  
10      counsel.

11                  What I would propose to do, Your Honor, is  
12      to move as quickly as I can to the ones to which there is  
13      no opposition.

14                  I will start first with the eight  
15      applications that were filed in connection with the  
16      international counsel that was retained by the Trustee.

17                  Very briefly, Your Honor. As you well  
18      know, as you say, not only from the newspapers report but  
19      the reports filed by Court there are many actions that are  
20      pending throughout the Caribbean and Europe with regard to  
21      assets that we claim are part of the estate.

22                  THE COURT: I said media, I didn't  
23      necessarily say newspapers.

24                  MR. SHEEHAN: I am just an old-timer so  
25      that is where I get most of my news. What could I say?

1                   In any event, Your Honor, those  
2 applications are all predicated upon the fact that in each  
3 of those jurisdictions and Gibraltar is one I know you are  
4 familiar with because we came before Your Honor to seek  
5 your assistance with regard to the enforcement of our  
6 action here in New York, that we have retained local  
7 counsel to assist us with regard to 75 million dollars,  
8 Your Honor, that is sitting in the accounts of the bank, of  
9 which there are two banks.

10                  But in any event, Bank Safra, and they are  
11 holding their firms pursuant to the direction of the  
12 Gibraltar court, and we have a fairly sophisticated fight  
13 going on with regard to the Chapter 15 issue with respect  
14 to the fact that we think we will come back before Your  
15 Honor where there is local, criminal as well as civil and  
16 the bankruptcy considerations that are in play. That Your  
17 Honor just highlights the need for that special counsel to  
18 assist us in that jurisdiction.

19                  You would go through each of the others,  
20 Your Honor, and I wouldn't take up the Court's time this  
21 morning because we have submitted it in our Trustee's  
22 report, that each of those jurisdiction in which we became  
23 counsel, similar actions are pending. They are all in  
24 different unique forums, in the liquidating action in  
25 Bermuda, and in BVI and in the individual actions in the

1 Cayman Islands.

2 All of that has required us to institute  
3 proceedings on behalf of Mr. Picard to appear given the  
4 fact there are assets there.

5 As Your Honor knows, in a case such as  
6 this, one of the things we have difficulty in doing is  
7 tracing all those assets, that they go through different  
8 transferees, and we have been successful in identifying a  
9 number of those assets, and hopefully we will be successful  
10 in retrieving them and bringing them back into the customer  
11 funds and property. But without the assistance of these  
12 counsel, I don't think we could accomplish that task.

13 So, Your Honor, I would move and they are  
14 not opposed, all eight applications and I could read into  
15 the record the various firms.

16 There is an application for interim  
17 professional compensation for Attias & Levy; for Eugene F.  
18 Collins; for Lovells LLP; SCA Creque, for Higgs Johnson  
19 Truman Bodden & Company; for Williams Barristers &  
20 Attorneys, for Schifferli Vafadar Sivilotti, for Schiltz &  
21 Schiltz. And those are the firms, Your Honor, I would  
22 respectfully move for their application for interim  
23 compensation.

24 THE COURT: Does anyone else want to be  
25 heard?

1                           MR. BELL: Kevin Bell, on behalf of the  
2 Securities Investor Protection Corp.

3                           SIPC has reviewed each and every  
4 application, and all the time records associated therewith,  
5 and has filed its recommendation in support of each of  
6 those applications of the international special counsel,  
7 and we would ask the Court to approve the applications as  
8 filed.

9                           THE COURT: I note that after doing a  
10 little look-see into all of them, most of them have  
11 voluntarily given a public interest discount.

12                          MR. SHEEHAN: That is correct. In each  
13 instance it is that we demand, quite frankly that each  
14 counsel be retained, make a 10 percent discount because it  
15 is a case in the public interest.

16                          THE COURT: What is it about it that makes  
17 you think they don't take that into account?

18                          MR. SHEEHAN: Your Honor, my cynicism and  
19 yours are of equal stature. I don't think I could do much  
20 more than that, but I agree it is a possibility.

21                          In any event, at the end of the day they  
22 also have a 20 percent holdback as is normal in the case of  
23 people who work as special counsel and counsel to the  
24 Trustee. So I believe, and probably most importantly  
25 something I should emphasize this morning, in addition to

1           the discount, having been subjected to the scrutiny of  
2           SIPC, and Your Honor has before you unredacted all of our  
3           time records, we maintain and also we maintain through  
4           international counsel very, very detailed reports of all  
5           the time that is being spent.

6                         So I know that good scrutiny is being  
7                         brought to all of those applications and Your Honor. So I  
8                         know that we in our office review them and sometimes feel  
9                         like corporate counsel reviewing records of retained  
10                       counsel around the country, but we do review all those  
11                       records as well.

12                       We have modified those and reject the time  
13                       entries by them, et cetera, et cetera.

14                       So all of these things are subject to I  
15                       good real scrutiny not only by our firm but by SIPC before  
16                       they ever reach Your Honor's desk.

17                       THE COURT: Well, then upon those  
18                       representations it would appear that the amounts requested  
19                       are reasonable and based upon the services rendered, and I  
20                       will approve the application.

21                       MR. SHEEHAN: Thank you, Your Honor.

22                       The next application, Your Honor is that of  
23                       Windels Marx. This is a law firm represented to you by  
24                       Alan Nisselson and Regina Griffin.

25                       Mr. Nisselson, as Your Honor will recall

1 from the early history of this case was appointed as the  
2 Chapter 7 Trustee for Bernard L. Madoff.

3 We moved for a substantial consolidation on  
4 behalf of Mr. Picard. A consent order was arrived at  
5 after much diligence it was engaged by Mr. Nisselson with  
6 regard to the preparedness of that application.

7 At the end of the day, Your Honor, Mr.  
8 Nisselson's firm was then retained as special counsel to  
9 the Trustee. And if I may, Your Honor, just to tell you,  
10 since that time we have worked, very, very cooperatively  
11 with Mr. Nisselson, Ms. Griffin, and other partners and  
12 associates in that firm.

13 As Your Honor well knows, that has yielded  
14 the fruit of the BLMIS Air, Chapter 11, what is before Your  
15 Honor, which is a very complex attempt to rename the asset  
16 known as the aircraft, a 30 million dollar jet that Mr.  
17 Blumfeld and Mr. Bernard Madoff purchased through a variety  
18 of different LLCs and, hopefully, at the end of the day  
19 that asset will be fully realized and returned to the  
20 estate, and the Windels Marx firm is handling that as well  
21 as a number other difficult situations in which Mr. Madoff  
22 embedded himself as the principal owner, utilizing the firm  
23 of BLMIS to carry the ball and get his interest, and  
24 obviously it should come back to the estate.

25 What isn't so obvious is the fact that he

1 has created these corporate structures that must be  
2 penetrated, dissected and then revealed as to what those  
3 interests are, how the money should be returned.

4                   We have asked Windels Marx to, because of  
5 Mr. Nisselson's continuing role as for a limited purpose as  
6 Your Honor will recall, utilizing his stature as a Chapter  
7 Trustee for Mr. Madoff, continuing in that role, he in  
8 these particular instances has, we believe, added strength  
9 and value in terms of appearing together as counsel to Mr.  
10 Picard in retrieving those assets for the estate.

11                   And there is no objection to this, Your  
12 Honor.

13                   THE COURT: Does anyone else want to be  
14 heard?

15                   MR. BELL: Your Honor, SIPC is in support,  
16 has reviewed the applications and time records, and would  
17 note that is in the international counsel, there is a 10  
18 percent public interest discount and SIPC has submitted its  
19 recommendations in support of the application as filed.

20                   THE COURT: Well, I was originally  
21 concerned with respect to the consolidation that there  
22 would be a redundancy, and apparently it has worked out  
23 well. There is more efficiency in the way the structure  
24 of the two estates, the combined estates have operated, and  
25 I am satisfied with the application.

1 MR. SHEEHAN: Thank you very much, Your  
2 Honor.

3 The next application, Your Honor, is also  
4 unopposed. It is an application by Mr. Richards and his  
5 firm representing Alix Partners.

6 Mr. Richards, I believe, will present that  
7 application.

8 MR. RICHARDS: Good morning, Your Honor.

9 THE COURT: Good morning, Mr. Richards.

10 MR. RICHARDS: I was appointed a little  
11 over a year ago to serve as the SEC's receiver. I served  
12 in that capacity for a month or so until the SIPC trustee  
13 was put in place and then in London, the provisional  
14 liquidators was put in place.

15 We made our application for deeply  
16 discounted fees. I believe they have been reviewed by  
17 SIPC, and I believe there is a consent by SIPC and we would  
18 otherwise rest on our papers, unless Your Honor has any  
19 questions.

20 THE COURT: Does anyone want to be heard?

21 MR. BELL: Your Honor, Kevin Bell for SIPC.

22 I believe SIPC has reviewed these  
23 applications, Your Honor, and the time records and has  
24 engaged in intensive discussions with the receiver as  
25 counsel, and has submitted its recommendation in support of

1                   the applications as filed and we would recommend, Your  
2 Honor, that the court approve them as filed.

3                   THE COURT: I will grant the applications,  
4 but I have one question. Alix Partners is no longer  
5 connected with the case or are they still being retained  
6 under the aegis of the SIPC trustee?

7                   MR. PICARD: They continued working for  
8 the trustee. They are a claimant.

9                   THE COURT: This application relates to  
10 these services to the receiver.

11                  MR. PICARD: That is correct. With  
12 respect to their work for me, they are pursuant to the SIPC  
13 statute.

14                  THE COURT: I was only curious because I  
15 saw this denominator as a final application.

16                  MR. PICARD: It's only final as the  
17 receiver.

18                  THE COURT: The application is granted.

19                  MR. BELL: Thank you, Your Honor.

20                  MR. SHEEHAN: Thank you, Your Honor.

21                  MR. PICARD: Good morning, Your Honor. At  
22 the outset I would like to suggest that you don't believe  
23 everything you read or hear in the media because of --

24                  THE COURT: I don't necessarily believe  
25 everything I read in the papers that are submitted to me

1 either.

2 MR. PICARD: I wasn't going there.

3 MR. SHEEHAN: Touche.

4 MR. PICARD: I will speak to my own  
5 application, and Mr. Sheehan will speak to the Baker  
6 Hostetler application.

7 My application as well as the firm's covers  
8 a five-month period through September 30. After giving  
9 effect to the 10 percent discount which he referred to and  
10 a write-off of approximately 225 hours, I am seeking  
11 \$835,605, of which \$710,264.25, would be paid currently.

12 And, Your Honor, \$125,340.75 will be  
13 deferred to a later point in the case.

14 I am also requesting a reduction of the 20  
15 percent holdback to 15 percent. That was originally set  
16 in the Court's order of February 25.

17 These requests have been approved by SIPC.  
18 They filed a recommendation in the last couple of days.

19 As Your Honor is aware, SIPC has been  
20 paying all of the administrative costs, one of which would  
21 include these fees and prior fees and the other fees that  
22 you have granted today.

23 MR. PICARD: Under the statute when SIPC  
24 has a goal in the statute it pays whenever it seems to be  
25 the rule.

1                   There are a couple of things I would like  
2 to state for the record, and this goes to some  
3 misinformation, Your Honor, that has been out in the public  
4 domain, some of which I had said at prior hearings.

5                   Number 1, no costs of administration are  
6 paid from the recoveries we make for the benefit of the  
7 customers. The costs of administration in this case, Your  
8 Honor, are paid by SIPC.

9                   Number 2, the percentage fee schedule,  
10 which applies in a Chapter 7 or a Chapter 11 bankruptcy  
11 case does not apply in a SIPC liquidation. So, therefore,  
12 I am not getting 3 percent as has been reported continually  
13 both in the press and other places, Your Honor.

14                  The 3, Your Honor, are whatever amounts you  
15 award to me are paid over to the firm. I do not keep  
16 them. There are --

17                  THE COURT: I have to assume the firm pays  
18 taxes on it.

19                  MR. PICARD: I would assume that is  
20 correct, Your Honor.

21                  THE COURT: And you, too.

22                  MR. PICARD: I do when the firm pays me.  
23 As far as I know, there has been one docketed objection,  
24 and there have been a couple of letters that have been  
25 sent. One of the objections is primarily focused on the

1 net equity issues making complaints that I believe are more  
2 appropriate to be heard on February 2 and not in connection  
3 with this fee application, Your Honor.

4 We did file a response yesterday to the  
5 various objections and I will rest on that response. But  
6 as noted there, Your Honor, some of the issues that are  
7 raised you previously have ruled on. They are raised  
8 again. I submit that the prior rulings in some cases  
9 don't even apply to this case, Your Honor.

10 One of the objections specifically contends  
11 that collecting assets in this case was easy. I beg to  
12 differ. I did not see the banks or the Depository Trust  
13 Clearing Corporation come to our door and offer to  
14 surrender the money and securities that they were holding  
15 in the name of BLMIS. In fact, it took a lot of time and  
16 effort to get those assets back and certainly under the  
17 circumstances it's not surprising that they weren't lining  
18 up at the door.

19 But, Your Honor, it took time, effort and  
20 we came to Court with a number of motions and applications  
21 and stipulations that Your Honor may recall back to the  
22 early part of the year.

23 Another apparent misconception or one that  
24 I have heard and that, quite frankly, I was surprised of  
25 was the price was raised in a congressional hearing last

1 week is that I have sued individuals for at least \$700  
2 million.

3 That is totally wrong, Your Honor. The  
4 only individuals other than the 14 major cases that we have  
5 brought, the only individuals who have been sued by me have  
6 been sued in counterclaims in response to a complaint that  
7 was filed against me.

8 The issue there, Your Honor, is we could  
9 not lose the opportunity by not counterclaiming when we  
10 answer to be able to bring a lawsuit or to be able to  
11 pursue matters down the road.

12 That meant in the matters now pending, an  
13 agreement by the parties, in not moving forward. So I  
14 would just like the record to reflect we have not sued the  
15 smaller individuals as has been reported.

16 Moving to claims, Your Honor. We have  
17 received more than 16,200 claims. Of that number we have  
18 determined 11,568 as of Tuesday. That is approximately 71  
19 percent, Your Honor.

20 We have committed over 563 million dollars  
21 of the SIPC funds based on the cash in and cash out  
22 methodology.

23 While I am not going to address that issue  
24 today, Your Honor, the record should reflect that I have  
25 informed customers publicly and in determination letters

1       that if the Court finally determines that the way we are  
2       dealing with claims is erroneous, we will go back and we  
3       will revisit all the claims' determinations whether or not  
4       a party has filed an objection.

5                          Your Honor, during the compensation period  
6       we implemented a hardship program in an effort to move  
7       forward people who were in tremendous need, whether they  
8       had medical problems, were losing their house to  
9       foreclosure, and various and sundry other means that were a  
10      problem that we could recognize, and we only got 317  
11      applications. Those have been moved through the system as  
12      best as we could.

13                          Many of them have been determined. Many  
14      have been allowed.

15                          As I indicated through counsel, I have  
16      started 14 pieces of litigation for approximately 15  
17      billion dollars. They are primarily fraudulent  
18      transactions. Without litigation we have already  
19      recovered 240 million dollars in preferences.

20                          These are people who have come forward.  
21      One was a stipulation that Your Honor heard a number of  
22      months ago. That has now been fully paid up and most of  
23      the others are being handled through the claims process in  
24      accordance with procedures that Your Honor fixed in the  
25      claims procedure order signed last December.

1                   We are hopeful, Your Honor, in the near  
2 future we will have some substantial recoveries of some  
3 other matters. We will bring them to the Court to the  
4 extent we have to do that and otherwise we will certainly  
5 let the public, the people who are interested in the case,  
6 know about them.

7                   Getting back specifically to my  
8 application, Your Honor. The four major areas in which I  
9 expended time during the period account for about 68  
10 percent. There are claims reviews, and case  
11 administrations, the Bankruptcy Court litigation and the  
12 Trustee's investigation.

13                   Your Honor, another approximately 12  
14 percent of the time has been spent in avoidance actions,  
15 asset searches and dealing with the United States  
16 Attorneys' Office.

17                   I would like to let the Court know that  
18 with respect to the U.S. Attorney's office we have a  
19 cooperative program, if you will, and that is not to say  
20 from time to time there aren't some little humps that we  
21 each have to get over, but we have had good communications  
22 and we are both progressing and doing what we each have to  
23 do.

24                   As I have noted earlier, there are  
25 insufficient funds in the estate. So SIPC will be paying

1       these fees and paying the costs of administration as it has  
2       all along.

3                             I would be happy to answer any questions,  
4       if you have any.

5                             THE COURT: Does anyone want to be heard?

6                             MS. VALLETTA: Yes, Your Honor. My name is  
7       Chryssa Valletta, from the Phillips Nizer law firm. We  
8       represent the objectants, Diane and Roger Peskin, Maureen  
9       Ebel and various other customers.

10                          I would just like to say our papers  
11      constitute an offer of proof and we respectfully request an  
12      opportunity to have an evidentiary hearing in which we  
13      could prove the facts set forth in our objection and proofs  
14      that fees should be disallowed and the trustee should be  
15      disqualified and that of his counsel.

16                          Other than that I rest on my papers unless  
17      Your Honor has any questions.

18                          THE COURT: Thank you, I have no questions.

19                          MR. BELL: Your Honor, SIPC is here in  
20      support of the Trustee application. As you have noted  
21      before, the Trustee has taken a 10 percent service  
22      discount, that is the Trustee and all counsel in this case.

23                          SIPC supports the reduction of the holdback  
24      of 20 percent to 15 percent going forward and backward,  
25      adjusting the Court's order of monthly compensation

1 procedure order of February.

2 Your Honor, I would like to emphasize at  
3 this point in time in the liquidation proceeding, SIPC  
4 agrees with the Trustee that there is no reasonable  
5 expectation that the general estate will be sufficient.

6 SIPC all along has hoped that we will move  
7 from the word "shall" to "may" in the preparatory language  
8 on the compensation. But at this point in time, SIPC  
9 agrees with the trustee that there is no reasonable  
10 expectation that there will be any money put for general  
11 creditors or that SIPC will be repaid any of the money in  
12 advance to pay all of the administrative expenses, both the  
13 fees and costs of this case.

14 I would further state that some of the  
15 objectors's points were made to Congress last week that  
16 there be suggested changes in the SIPA statute.

17 I think within hours of those suggestions,  
18 Congress passed minor amendments and at least the House of  
19 Representative left the statute standing including all  
20 provisions with regard to fees that the Court would be  
21 acting under.

22 THE COURT: Well, there has been a  
23 response to the objections that have been filed and,  
24 frankly, I would be a little bit surprised if there was the  
25 support for the response given to the respondents long

1 term.

2                   Frankly, the Trustee's response and their  
3 presentation today makes it clear that there is nothing in  
4 the objection to the Trustee's fees or the fees of Baker  
5 Hostetler that creates issues even that I haven't addressed  
6 previously, nor do they raise any sufficient concerns that  
7 this Court should order some kind of an evidentiary  
8 hearing. There is backup in connection with that.

9                   And some of the objections while  
10 cosmetically look somewhat appealing are bordering on the  
11 frivolous. The Trustee is charged with the mission of  
12 going out to hunt out for assets and under in a case like  
13 this that hunt is not easily achieved.

14                  For example, objections to the use of 2004  
15 subpoenas on a broad base is something that is almost basic  
16 that it is a requirement of a case like this and the  
17 objection on that ground that the Trustee is too aggressive  
18 doesn't resonate with appropriate sincerity.

19                  I am aware that the objectants have a  
20 position which they articulated in the past and in the  
21 media and before me, and the issues that are there are the  
22 ones that will be dealt with appropriately when that is a  
23 complete joinder and when I have all of the issues before  
24 me I can make the appropriate determinations.

25                  So, I am going to overrule the objection on

1 basically the same ground that I have done previously, and  
2 I find nothing new in the current objection that overlaps  
3 the original rulings.

4 I do overrule the objections at this point.

5 MR. SHEEHAN: Your Honor, what remains is  
6 only the application of Baker Hostetler. Your Honor is  
7 fully familiar with the record. I don't intend to cover  
8 that again.

9 I think the Trustee this morning has  
10 addressed most of the objections that were raised by the  
11 other side.

12 THE COURT: And the other side has rested  
13 on those papers and I already responded.

14 So, does anyone else want to be heard?

15 There were two letter objections.

16 MR. SHEEHAN: There were, Your Honor.

17 MR. PICARD: Your Honor, with respect to  
18 one of them, the person who wrote the letter was not a  
19 customer. But the customer to whom that person is related  
20 has had his claim determined and allowed and that includes  
21 the \$500,000 SIPC advance.

22 MR. SHEEHAN: Unless you want to hear  
23 something further from me, and I am more than happy to do  
24 that, we are concluded.

25 THE COURT: Does anyone else want to be

1 heard?

2 The applications are granted.

3 MR. SHEEHAN: I have multiple sets of  
4 orders and a disk with all of the applications for Your  
5 Honor's consideration.

6 THE COURT: I will entertain it. I have  
7 approved the order.

8 MR. SHEEHAN: Thank you very much, Your  
9 Honor. The SIPC trustee thanks you, Your Honor.

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1 C E R T I F I C A T E

2

3 STATE OF NEW YORK }  
4 COUNTY OF NEW YORK }

} ss.:

5

6 I, MINDY CORCORAN, a Shorthand Reporter  
7 and Notary Public within and for the State of New York, do  
hereby certify:

8 That I reported the proceedings in the  
9 within entitled matter, and that the within transcript is a  
10 true record of such proceedings.

11 I further certify that I am not related, by  
12 blood or marriage, to any of the parties in this matter and  
13 that I am in no way interested in the outcome of this  
14 matter.

15 IN WITNESS WHEREOF, I have hereunto set my  
16 hand this 19th day of December, 2009.

17

18

19 \_\_\_\_\_  
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21 MINDY CORCORAN  
22  
23  
24  
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